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In The
Supreme Court of the United States
TERM, 1942

No. 556

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CREEK, STATE OF OKLAHOMA, a Municipal Corporation, ET AL.,

Petitioners,

vs.

EVELYN SEBER ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT

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HOUSTON E. HILL,
Assistant Attorney General;

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November, 1942.

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1. The Acts apply only to a "landless" Indian who had never held land prior to the purchase of property for him out of restricted funds: said Acts have no application to an Indian such as Wosey John Deere who was at all times possessed of a Creek allotment and who died on September 2, 1938, possessed of property valued at valued at $359,643 (see minority opinion) 19

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No.

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Petitioners,

VS.

EVELYN SEBER ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI REQUIRING THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES, FOR ITS REVIEW AND DETERMINATION, THE CASE OF BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CREEK, STATE OF OKLAHOMA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS, VS. EVELYN SEBER ET AL., APPELLEES, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States.

Your petitioners respectfully show:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is an action in which the Circuit Court below (with dissenting opinion) permitted respondents to recover ad valorem taxes paid for the years 1937, 1938, 1939 and 1940 on the following described land in Creek County, Oklahoma:

> W½ of SW¼ of Sec. 27—18 N—11 E; W½ of NW¼ of SW¼ of SW¼, and W½ of E½ of NW¼ of SW¼ of SW¼ of Sec. 36—18 N—11 E, containing 87½ acres (130 Fed. [2d] 666).

The majority opinion of the Circuit Court also upheld a declaratory judgment decreeing the land tax exempt. Although certain additional land was originally involved in the action, the above described land is all that need be considered for the purposes of this petition.

Respondents, as tenants in common, are the owners of said land, having acquired fee simple title thereto by gift on December 10, 1937. On December 16, 1937, respondents designated said land as homestead, under Act of Congress of May 19, 1937. Although respondents happen to be possessed of full Indian blood, they are not enrolled as members of any Indian tribe. Petitioners are public officials of Creek County, Oklahoma.

Respondents' grantor was their mother, Wosey John Deere. She was enrolled opposite Roll No. 9546 of the Creek Tribal Roll. Said land had been purchased for her prior to 1927 out of her restricted funds in the custody of the Secretary of the Interior. Wosey John Deere reserved an interest (life estate) in said land in a conveyance made to respondents on March 4, 1931, but she conveyed said reserved interest to respondents on December 10, 1937. At all times material herein, Wosey John Deere was possessed of a homestead which had been alloted to her by virtue of her tribal enrollment. As was said in the minority opinion (130 Fed. [2d] 682, 683):

> "The Creeks * * * could not properly be denominated landless Indians * * * Lands were allotted to their members * * *. Under * * * acts of April 12, 1926, and May 10, 1928, Congress continued in applicable cases not only restrictions, but also non-taxability not exceeding 160 acres, held by an allottee after April 26, 1931. That would cover the original allotted lands of Wosey John Deere * * *."

Respondents inherited $359.643 from said grantor, Wosey John Deere, who died on September 2, 1938. On the basis of cases numbered 2558, 2559, 2560, pending in the Circuit Court of Appeals, styled United States v. Oklahoma Tax Commission, the minority opinion of the Circuit Court said (130 Fed. [2d] 685):

> "The court takes judicial knowledge of the fact that the inherited restricted estate of Wosey John Deere in the custody of the Secretary of Interior on September 2, 1938, amounted to $359.643, and the record shows that these appellants were her heirs * * *."

The majority opinion of the Circuit Court was based upon the following Congressional Acts:

Act of Congress of June 20, 1936 (49 Stat. L. 1542):

"Sec. 1. * * * There is hereby authorized to be appropriated * * * the sum of $25,000, to be expended * * * for the payment of taxes * * * assessed against individually owned Indian land, the title to which is held subject to restrictions against alienation or encumbrance * * * heretofore purchased out of trust or restricted funds of an Indian, where the Secretary [of Interior] finds that such land was purchased with the understanding and belief on the part of said Indian that after purchase it would be non-taxable * * *.

"Sec. 2. All lands, the title to which is now held by an Indian subject to restrictions against alienation or encumbrance except with the consent of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of said Indian, are hereby declared to be instrumentalities of the Federal Government and shall be non-taxable until otherwise directed by Congress" (49 Stat. L. 1542).

Amendatory Act of Congress of May 19, 1937 (50 Stat. L. 188), 25 U. S. C. A., Sec. 412a (amending Sec. 2 above to read as follows):

"Sec. 2. All homesteads, heretofore purchased out of the trust or restricted funds of individual Indians, are hereby declared to be instrumentalities of the Federal Government and shall be non-taxable until otherwise directed by Congress: Provided, That the title to such homesteads shall be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior; and, provided further, that the Indian owner or owners shall select, with the approval of the Secretary of the Interior, either the agricultural and grazing lands, not exceeding a total of one hundred and sixty acres, or

the village, town or city property, not exceeding in cost $5000.00, to be designated as a homestead."

The majority opinion said (130 Fed. [2d] 670):

"The taxable status of all property in Oklahoma is fixed as of January first of each year * * *."

The Act of June 20, 1936, was in force on January 1, 1937, and it was under that Act that the majority opinion permitted recovery of 1937 ad valorem tax.

The Act of May 19, 1937, was in force on January 1, 1938, and respondents had designated the land as homestead on December 16, 1937, and it was under that Act that the majority opinion permitted recovery of 1938, 1939 and 1940 ad valorem tax.

This action involved no disputed questions of fact. (See Agreed Statement of Fact, T. 41-50).

II.

STATEMENT OF POINTS RELIED ON BY PETITIONERS

1. Act of Congress of June 20, 1936, and Act of Congress of May 19, 1937, are unconstitutional because the Congress of the United States cannot, for purposes of exemption from state taxation, create a "Federal instrumentality" out of the person or property of an individual merely because such individual is possessed of a quantum of Indian blood.

2. Act of Congress of June 20, 1936, and Act of Congress of May 19, 1937, are not applicable to the land here involved.

(a) The Acts apply only to a "landless" Indian who had never held land prior to the purchase of property for him out of restricted funds; said Acts have no application to an Indian such as Wosey John Deere, who was at all times possessed of a Creek allotment and who died on September 2, 1938, possessed of property valued at $359,643.

(b) The Act of June 20, 1936, limited tax exemption to "* * * lands, the TITLE to which is now held by an Indian * * *, heretofore purchased out of trust or restricted funds of SAID Indian," and the Act of May 19, 1937, limited the tax exemption to HOMESTEAD lands. Since the land in question was purchased out of the funds of respondents' grantor rather than the funds of respondents, respondents cannot claim tax exemption.

III.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. Congress has no power to grant exemption from state taxation to individuals without tribal status merely because they happen to have a quantum of Indian blood. The Commerce clause of the Constitution (Art. 1, Sec. 8) merely gives Congress the power "To regulate Commerce with foreign nations and among the several states, *and with the Indian Tribes* * * *." When a circuit court upholds legislation which constitutes so grave an interference with the taxing power of a state, then the Supreme Court of the United States should take jurisdiction in order to correct the abuse.

2. The Congress and the Federal courts have no doubt been influenced by *obiter dictum* of the Supreme

Court in passing on questions arising out of treaty obligations. The Congress and the Federal courts have also been influenced by the language used in a certain line of cases which was overruled by *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, 58 S. Ct. 623, 82 L. ed. 907. The Supreme Court of the United States should take jurisdiction here in order to settle the confusion that seems to obtain in so many high quarters.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue to the Circuit Court of Appeals for the Tenth Circuit, charging said court to certify and send to this Court a full and complete transcript of the record and all proceedings of said Circuit Court had in the case numbered and entitled on its docket, No. 2488, Board of County Commissioners of the County of Creek, State of Oklahoma, a municipal corporation, et al., appellants, v. Evelyn Seber et al., appellees, to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of said United States Circuit Court of Appeals be reversed by the Court, and for such relief as to this Court may seem proper.

Copies of the transcript of record in this case in the Circuit Court of Appeals for the Tenth Circuit are filed herewith in conformity with Rule No. 38 of this Honorable Court.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

THE OPINION OF THE COURT BELOW

This petition prays for a review of the judgment entered in case No. 2488 in the Circuit Court of Appeals for the Tenth Circuit, on September 2, 1942 (T. 107). A majority opinion (130 Fed. [2d] 663; T. 61), and a minority opinion (130 Fed. [2d] 671; T. 72), were written. No petition for rehearing was filed.

II.

JURISDICTION

1. The ground on which the jurisdiction of this Court is invoked is Judicial Code 240, as amended by Act of February 13, 1925, c. 229, Sec. 1 (43 Stat. 938), 28 U. S. C. A. 347, providing for the issuance of writs of certiorari by the Supreme Court of the United States to review judgments of the Circuit Court of Appeals.

2. The facts in this case as stipulated show that the nature of the case and of the rulings below were such as to bring the case within the scope of the provision relied on. (See Agreed Statement of Fact, T. 41-50).

3. This case is of the utmost gravity to the State of Oklahoma. It involves the constitutionality of the Act of Congress of June 20, 1936 (49 Stat. L. 1542), and

the amendatory Act of May 19, 1937 (50 Stat. L. 188, 25 U. S. C. A., Sec. 412a). Under the holding of the Circuit Court below the solvency of a large number of counties and school districts within the State of Oklahoma is threatened. Although Oklahoma, with two-thirds of the Indian population of the United States, is the State most seriously affected, many other states have also been prejudiced.

III.

STATEMENT OF THE CASE

The nature of the case and the ruling of the Circuit Court of Appeals for the Tenth Circuit have already been set forth in the foregoing petition which is adopted as a part of this brief.

IV.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in holding that the Acts of Congress in question are constitutional.

2. The Circuit Court of Appeals erred in holding that the Acts of Congress in question are applicable to the land here involved.

a. The court erred in holding that Wosey John Deere (who possessed a Creek allotment at the time the land in question was purchased for her, and whose property was valued at $359,643) was in the category of persons entitled to receive the benefits of Act of Congress of June 20, 1936 (49 Stat. L. 1542).

b. The court erred in holding that respondents (who were possessed of full Indian blood, but were

not enrolled in any Indian tribe or possessed of any restricted funds) and who acquired the land in question by gift, were in the category of persons entitled to receive the benefits of Act of Congress of June 20, 1936 (49 Stat. L. 1542), as amended by Act of Congress of May 19, 1937 (50 Stat. L. 188, 25 U. S. C. A., Sec. 412a).

3. The Circuit Court of Appeals erred in holding that—because Wosey John Deere owned an interest in the land in question on January 1, 1937—respondents were entitled to recover ad valorem taxes paid on said land for the year 1937, even though neither Wosey John Deere nor the administrator of her estate were parties to this action.

4. The Circuit Court of Appeals erred in permitting respondents to recover ad valorem taxes which had been paid on the land in question more than three years before the filing of this action, such action being barred by the statute of limitations of the State of Oklahoma.

5. The Circuit Court of Appeals erred in upholding Federal jurisdiction in this action, in view of Section 12665, O. S. 1931, which has the effect of requiring that actions for the recovery of illegally collected taxes shall be filed in the courts of the State of Oklahoma rather than the Federal courts.

V.

ARGUMENT

SUMMARY OF ARGUMENT

1. Act of Congress of June 20, 1936, and Act of Congress of May 19, 1937, are unconstitutional because

the Congress of the United States cannot, for purposes of exemption from state taxation, create a "Federal instrumentality" out of the person or property of an individual merely because such individual is possessed of a quantum of Indian blood.

2. Act of Congress of June 20, 1936, and Act of Congress of May 19, 1937, are not applicable to the land here involved:

(a) The Acts apply only to a "landless" Indian who had never held land prior to the purchase of property for him out of restricted funds; said Acts have no application to an Indian such as Wosey John Deere who was at all times possessed of a Creek allotment and who died on September 2, 1938, possessed of property valued at $359,643.

(b) The Act of June 20, 1936, limited tax exemption to "* * * lands, the TITLE to which is now held by an Indian * * *, heretofore purchased out of trust or restricted funds of SAID Indian," and the Act of May 19, 1937, limited the tax exemption to HOMESTEAD lands. Since the land in question was purchased out of the funds of respondents' grantor rather than the funds of respondents, respondents cannot claim tax exemption.

ARGUMENT IN CHIEF

PROPOSITION I.

The Acts of Congress in question are unconstitutional because the Congress of the United States cannot, for purposes of exemption from state taxation, create a "Federal instrumentality" out of the person or property of an individual merely because such individual is possessed of a quantum of Indian blood.

The majority opinion of the Circuit Court purports to dispose of the constitutional question in the following language (130 Fed. [2d] 670):

> "The exemption granted here is based upon the power of the Federal Government to create a Federal instrumentality out of lands heretofore taxable by the State of Oklahoma, and to immunize them against taxation."

The above statement was made by the court without citation of authority. More serious is the fact that the above statement begs the question. Of course, the Federal Government can—in pursuance of a bona fide constitutional purpose—create a Federal instrumentality, immune from state taxation. But it is the position of the State of Oklahoma that *the Federal Government cannot, for purposes of exemption from state taxation, create a "Federal instrumentality" out of the person or property of an individual merely because such individual is possessed of a quantum of Indian blood.*

There is dictum in the case of *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575, 72 L. ed. 709, which may appear to support the majority opinion of the Circuit Court. The following unfortunate language was used in that case:

> "The construction to be placed on these decisions is that the lands now in question, and hence the interest of the lessee in them are not such instrumentalities of the government as will be declared immune from taxation *in the absence of an express exemption by congress* * * *."

But since when has Congress ever had the power to confer immunity from taxation on a person by turning him into a Federal instrumentality, even though some Indian blood be involved? Whence came this Circe-like power? The commerce clause of the Constitution (Art. 1, Sec. 8), provides that Congress shall have power "to regulate commerce with foreign nations and among the several states, *and with the Indian Tribes* * * *." This is a far cry from granting exemption from state taxation to individuals without tribal status who happen to have a quantum of Indian blood.

On principle, the use of the concept "Federal instrumentality" in connection with individuals possessed of some Indian blood, constitutes an abuse no less serious than the use of the concept of "freedom of contract" in connection with certain regulatory measures. Neither of these two concepts are to be found in the Constitution. Both may, on occasion serve a useful purpose. The Supreme Court, as now constituted, has recognized that "freedom of contract" has too often been used to arrive at decisions which could not be sustained by the language of the Constitution or the logic of events. The phrase "freedom of contract" has lost its place in the abracadabra of constitutional ritual, and societal control is no longer to be confined by such an incantation. Now let the jargon of legalistic conjuration be further delimited by stripping the "instrumentality" gloss from the simple constitutional reference to Indian tribes.

Helvering v. *Mountain Producers Corp.*, 303 U. S. 376, 58 S. Ct. 623, 82 L. ed. 907, has pointed the way to rectification of the boundaries of tax exemption on lands affected by Indian rights. It has an indirect bearing on the present validity of the dictum in *Shaw* v. *Gibson-Zahniser Oil Corp.*, *supra*, to which reference has been made.

In *Shaw* v. *Gibson-Zahniser Oil Corp.*, *supra*, the Court said:

> "* * * Neither leases of * * * [restricted allotted or tribal] lands, Indian Territory Illuminating Oil Co. v. Oklahoma * * *, nor the exploitation of the land by the lessee, Howard v. Gypsy Oil Co. * * *, Large Oil Co. v. Howard * * *, Choctaw O. & G. R. Co. v. Harrison * * *, Jaybird Min. Co. v. Weir * * *, nor his income from the lease * * *, may be taxed by the state."

But in *Helvering* v. *Mountain Producers Corp.*, *supra*, the Court said:

> "We are convinced that the rulings in Gillespie v. Oklahoma * * *, and Burnet v. Coronado Oil & Gas Co., are out of harmony with correct principle and accordingly they should be, and they now are, overruled."

And further:

> "We have always recognized that no constitutional implications prohibit a non-discriminatory tax upon the property of an agent of the government merely because it is the property of such an agent and used in the conduct of the agent's operations and necessary for the agency."

And here is a point to be stressed: To hold, in *Helvering* v. *Mountain Producers Corp.*, *supra*, that certain

cases were "out of harmony with correct principle," necessitated an outright overruling of those cases; but to hold that a certain dictum in *Shaw* v. *Gibson-Zahniser*, *supra*, is "out of harmony with correct principle," requires nothing so drastic. This is the very first time that this Court has had occasion to pass upon the power of Congress to render lands exempt from state taxation where tribal rights are not involved. The cases sustaining tax exemption have dealt with lands *allotted* to individuals out of *tribal* holdings, and those lands were exempt from taxation under treaties executed between the Indian tribes and the United States before Oklahoma acquired statehood. Naturally, Oklahoma entered upon statehood subject to vested treaty rights.

But questions of tribal lands and treaty rights do not arise in the case at bar. The landowner respondents are not enrolled in any Indian tribe. The mere fact that they are of Indian blood does not place them in any special constitutional category. The lands in question were taxable in the hands of their grantor's predecessor in title. The lands were purchased for their grantor out of her restricted Indian funds, not out of any funds belonging to them. To refer to these landowner respondents as "Federal instrumentalities" is certainly the *reductio ad absurdum* of the "instrumentality" concept.

The majority opinion of the Circuit Court has stressed provisions in the Enabling Act and the Oklahoma Constitution which relate to Indian property rights and the authority of the United States to regulate such rights. Such provisions have no application here. They are to be read in the light of the conditions obtaining at the time of the admission of the State of Oklahoma into the Union.

At the time of the admission, a considerable amount of land within the boundaries of Oklahoma was subject to tax exemption by virtue of treaties made by the United States with Indian tribes. Naturally, the United States had no right to violate its treaty obligations. The United States had no right to make any agreement with Oklahoma that would impair those treaty obligations. Oklahoma knew what those treaty obligations were, and assumed the status of statehood with full knowledge of their provisions. Thus Oklahoma entered upon statehood subject to certain tax exemptions, the extent of which was clearly defined and well known to the Indians, the United States and Oklahoma. It was tax exemption of this character which has been many times upheld by the Supreme Court of the United States. *Choate* v. *Trapp*, 224 U. S. 665.

It must be emphasized that the tax exemption, under consideration at the time of the Enabling Act and the Oklahoma Constitution, attached to certain definite and specific tribal lands. The fact that the ownership of such

tribal lands was, at that time, in process of passing from ownership in common to ownership in severalty, is not material, because the change in character of ownership could not extend the boundaries of the tax exempt land beyond the limits which had been agreed upon by the United States, Oklahoma and the Indians.

A specific tax exemption on specific lands, originally tribal in character, was the only type of tax exemption ever considered. It was the only type of tax exemption that could possibly be valid. It is important that this issue not be confused with the power of the United States to impose RESTRICTIONS on its Indian wards. The power of the United States to make judgments as to the degree of competence possessed by individual Indians cannot be challenged by a state. That is a matter between the United States and the individual Indian. That power is not dependent upon any acquiescence by a state in its Enabling Act or its Constitution; no state in the Union can escape its exercise. Oklahoma's situation in that respect is not inferior to the situation of any other state.

Never has the Supreme Court of the United States held that PURCHASED lands, other than those of a tribal character, could be rendered tax exempt by mere fiat of Congress, simply because they were OWNED by an individual Indian, or because restricted funds of an Indian grantor were used in their purchase.

PROPOSITION II.

The Act of Congress of June 20, 1936 (which deals with lands purchased out of an individual Indian's own restricted funds), and the Act of Congress of May 19, 1937 (which amends said 1936 Act by limiting it to homesteads), are not applicable to the lands here involved.

---

1. The Acts apply only to a "landless" Indian who had never held land prior to the purchase of property for him out of restricted funds; said Acts have no application to an Indian such as Wosey John Deere who was at all times possessed of a Creek allotment and who died on September 2, 1938, possessed of property valued at $359,643 (see minority opinion).

Because of the fact that so large a proportion of the Oklahoma Indians have been the beneficiaries of allotted lands, there has been a tendency to overlook the fact that large numbers of American Indians were not included in the treaties made by the United States with Indian tribes relative to land distribution.

On behalf of certain American Indians who were "landless," a program of land purchase was entered upon some years ago. The Acts in question relate to that program. When the Act of June 20, 1936, was considered on the floor of the Senate, Senator Elmer Thomas referred to the program as follows:

> "* * * The Congress authorized the Secretary of the Interior to buy land for landless Indians. The Secretary proceeded to buy the lands and assigned the Indians to reside upon such lands" (Congressional Record for the Senate for June 6, 1936, page 9159).

However, the program ran into difficulties. Apparently, those in charge of it failed to make clear to the Indians the fact that the privilege of land ownership carried burdens such as taxes. Senator Thomas described the situation as follows:

> "The recommendation or assertion was made to the Indians that the land would be theirs and they would have no taxes to pay * * *. In some cases tax warrants have been issued and the Indians have been threatened with dispossession. The department believes that in order to keep faith with the Indians, the tax warrants and tax assessments should be paid * * *. The bill [Act of June 20, 1936], authorizes the appropriation of money for that purpose" (Congressional Record, *supra*).

It has been observed that the majority opinion of the Circuit Court awarded recovery of 1937 ad valorem taxes to respondents because their grantor, Wosey John Deere, owned a life estate in the land on January 1 of that year, the date on which taxable status for the year was fixed.

And the following portions of the minority opinion of the Circuit Court have been quoted:

> "The Creeks * * * could not properly be denominated landless Indians * * * Lands were allotted to their members * * *. Under * * * acts of April 12, 1926, and May 10, 1928, Congress continued in applicable cases not only restrictions, but also non-taxability not exceeding 160 acres held by an allottee after April 26, 1931. That would cover the original allotted lands of Wosey John Deere (130 Fed. [2d] 682, 683).
>
> * * * * * * * *
>
> "The court takes judicial knowledge of the fact that the inherited restricted estate of Wosey John Deere in the custody of the Secretary of the Interior on Sep-

tember 2, 1938, amounted to $359,643, and the record shows that these appellants were her heirs" (130 Fed. [2d] 685).

There was clearly no legislative intent to authorize tax exemption on land held by an Indian such as Wosey John Deere. It has been observed that the Act of June 20, 1936, appropriated $25,000 to pay real property taxes for Indians. Certainly this was not done for the relief of an Indian who owned property valued at more than three hundred thousand dollars. It has been seen that Senator Elmer Thomas, sponsor of the legislation in question, informed the Senate that the legislation would apply only to land bought for "landless" Indians. But Wosey John Deere was not a "landless" Indian—she was the owner of allotted Creek land.

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2. The Act of June 20, 1936, limited tax exemption to "* * * lands, the TITLE to which is now held by an Indian * * *, heretofore purchased out of trust or restricted funds of SAID Indian," and the Act of May 19, 1937, limited the tax exemption to HOMESTEAD lands. Since the land in question was purchased out of the funds of respondents' grantor rather than the funds of respondents, respondents cannot claim tax exemption.

It has been observed that respondents acquired fee simple title to the land in question on December 10, 1937, and that respondents designated the land as a homestead on December 16, 1937, under Act of May 19, 1937. The majority opinion of the Circuit Court awarded recovery of 1938, 1939 and 1940 ad valorem taxes to respondents

because they owned the land on January 1 of each of those years, that being the date on which taxable status was fixed.

It would seem that the Act of May 19, 1937, was passed because the Act of June 20, 1936, had been found to be entirely too broad and indiscriminate. Much of the property which had been bought for "landless" Indians was producing an income ample for the payment of taxes, and certain Indians deliberately allowed taxes to accumulate, relying on the bounty of the government. The circumstances demanded the imposition of a limitation. Said Senator Thomas:

> "Since the passage of said Act of June 20, 1936 (49 Stat. L. 1542), it was found the provisions of section 2 thereof * * * would exempt from taxation vast quantities of property such as * * * farm lands which are not homesteads, etc."

Therefore, section 2 of the Act of June 20, 1936, was stricken and a substitute section 2 was furnished for said Act by the amendment of May 19, 1937, containing the following provision:

> "Sec. 2. All homesteads heretofore purchased out of the trust or restricted funds of individual Indians are hereby declared to be instrumentalities of the Federal Government and shall be non-taxable * * *. The Indian * * * shall select * * * either * * * lands * * * or city property * * * to be designated as a homestead."

There is every reason to assume that the 1937 Act was intended to be a limitation on the 1936 Act. There is no reason to assume that the 1937 Act was intended to ex-

tend and broaden the 1936 Act. Yet, the majority opinion of the Circuit Court held, in effect, that—while the 1936 Act made the tax exemption a personal right, limited to the person whose funds were used to purchase the land—the 1937 Act extended the tax exemption to subsequent takers of such land. Thus the majority opinion said:

> "* * * Congress * * * on May 19, 1937, eliminated the ambiguity provoking language contained in the original act by declaring that all homesteads heretofore purchased with trust or restricted funds of an individual Indian, restricted against alienation without the approval of the Secretary of the Interior, were instrumentalities of the Federal Government and exempt from all taxes * * *."

We are unable to see why the 1937 Act should be interpreted to render the land in question tax exempt in perpetuity. The tax exemption was, at most, designed to protect the individual Indian out of whose restricted funds the land was purchased. No evidence exists from which it can be assumed that there was any legislative intent to benefit grantees. On the floor of the Senate Senator Thomas, sponsor of the legislation in question, advocated passage of the 1937 Act in the following language:

> "Since the passage of said Act of June 20, 1936 (49 Stat. L. 1542), it was found the provisions of section 2 thereof * * * would exempt from taxation vast quantities of property such as * * * *farm lands which are not homesteads*, etc." (Congressional Record).

CONCLUSION

We do not threaten that Oklahoma will secede from the Union if this Court does not grant the prayer of this petition. We recognize that the Civil War established the supremacy of the federal power, and that a part of that power resides in the federal judiciary. But we recall that it was only a few short years ago that Mr. Justice Stone was compelled to write memorable words of protest: "* * * The only check upon our own exercise of power is our sense of self-restraint." This was a counsel of restraint in dealing with Acts of Congress. In the case at bar, we pray that restraint be exercised in dealing with state taxation and exemption therefrom.

We realize that this Court has no desire to burden itself with obscure problems arising out of special Indian legislation, when a myriad of consequential social problems press for attention. We realize that most "Indian" cases are of slight significance to any persons beyond the litigants, and that such cases are but a minor eddy in the broad stream of judicial business.

But we must respectfully insist that this is no trival case. The very solvency of many Oklahoma counties and school districts may well be contingent upon the decision reached here. The Acts of Congress in question were interpreted by the court below to mean that, when restricted Indian funds are used to purchase a 160-acre homestead, the 160 acres are immune from state taxation, even when

they pass to persons who are not enrolled in any Indian tribe. Restricted Indian funds are not so small but that they could be used in this fashion to remove a very significant proportion of Oklahoma property from the tax rolls.

However, we have no desire to overstate the case. We do not pretend that the State of Oklahoma could not survive an adverse decision. And, after all, the breakdown of a system of state taxation might be merely a reflection on the wisdom of the legislation responsible, rather than a test of constitutionality. Be that as it may, we do believe that the principle involved here does justify this Court in taking jurisdiction.

Constructive efforts of the Federal Government, to function in a field of national concern, are no longer thwarted by this Court on the basis of any threadbare "states' rights" concept. But this appeal does not involve an attempt by Congress to regulate or control conditions which are beyond the effective power of the state. Nor does it involve an attempt by Congress "to regulate commerce with the Indian Tribes" or to enforce treaties. This appeal deals with the power of Congress to deprive a state of the power to tax the lands of an American citizen of Indian blood where no treaty or tribal land is involved.

A great deal has been said in the cases about the guardianship to be exercised by Congress over its Indian wards. And, after many years of abuse and broken faith on the

part of the Federal Government, it has been good to see the development of such a wholesome attitude. While there may be those who would explain this new approach as the manifestation of a guilty conscience, we need not inquire into that here.

A large number of our present citizens of Indian blood are not enrolled in any tribe, and, in Oklahoma at least, tribal government is of little practical significance. Congress may feel, however, that many citizens of Indian blood—even though not enrolled in any tribe—are poor business men and unable to pay state taxes on lands (other than tribal lands) which they have acquired by inheritance, gift or purchase. And such a conclusion might not be without foundation. (Peculiarly enough, the burden of taxes has been found an insuperable obstacle to retention of land by many citizens without a drop of Indian blood).

Now if Congress desires to shower its beneficence on such citizens of Indian blood, it probably needs no express constitutional authorization to do so. If Congress desires to appropriate the money necessary to pay the state taxes accruing on the property of such Indians, we have no desire to stand in the way. But we do vigorously protest when Congress expects its splendid manifestation of generosity to be paid for out of the Oklahoma pocketbook. If we are inclined to view with suspicion the tender expressions of solicitude for the Indian wards which have issued forth from the Congress and the Federal courts, we

trust that our attitude is understandable. There has been no showing that Oklahoma has handled the Indian situation improperly. If there be any governmental responsibility for the plight of any of our citizens of Indian blood, then it is the responsibility of forty-eight states, not one. We assert that neither the Constitution nor reason afford any justification for interference with state taxation in this case.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power, by granting a writ of certiorari and thereafter reviewing the opinion of the United States Circuit Court of Appeals for the Tenth Circuit and reversing the decision below.

Respectfully submitted.

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